No. 16,190

United States Court of Appeals

For the Ninth Circuit

Mrs. Grace Carrigan,

Appellant,

vs.

Sunland-Tujunga Telephone Company and State of California, Public Utilities Commission,

Appellees.

BRIEF OF APPELLEE STATE OF CALIFORNIA, PUBLIC UTILITIES COMMISSION.

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INDEX

Table of Authorities Cited

Cases

Statutes

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I. STATEMENT OF PLEADINGS.

Appellant has certified numerous letters to this Court as part of the record herein. Appellee Public Utilities Commission neither has nor wants copies of said letters, nor any knowledge of their contents, as they properly form no part of the record. Although this appellee has not made any motion in this regard, it respectfully directs the Court's attention to the fact that matters not of record are before it.

II. STATEMENT OF FACTS.

In her appeal brief, appellant states that appellees in making their motions to dismiss her complaint in

the Court below misrepresented and misstated the contents of the complaint, but does not give any statement of facts showing wherein said contents were misrepresented or misstated.

Very briefly, the facts are these:

Section 4251 of the Internal Revenue Code (Title 26 USC) prior to the 1958 session of Congress provided for a 10% excise tax on telephone charges. Local service was defined in Section 4252 as service which was not taxable as long distance service. Long distance service was defined as service for which a charge of more than 24¢ was made. Section 4254 provided that in computing the tax, all local service charges should be added together and the tax imposed on their sum, and all long distance service charges should be added together and the tax imposed on their sum, and not on the charges for each item.

In fixing schedules of telephone rates, appellee Commission has fixed for appellee telephone company rates and charges for three types of service which affect appellant—exchange, multi-message unit and message toll service.

The Commission has nothing to do with the tax imposed by the Internal Revenue Code, nor were such taxes included in the rates fixed. Appellee does not complain of the tax imposed on her flat-rate exchange service, nor of any tax of more than 24¢ on multi-message unit charges, nor of any tax on her message toll charges which are always in excess of 24¢. She complains that some of her multi-message unit calls (which go beyond her exchange boundaries) result

in charges of less than 24 cents on which a 10% tax was collected from her by appellee telephone company for the Bureau of Internal Revenue; that the appellee Commission cannot lawfully prescribe the above-mentioned three categories of service nor rates therefor because the Internal Revenue Code *for tax purposes* defined only two categories of service—local service as service for which a charge of less than 24¢ is made and long distance as service for which a charge of more than 24¢ is made.

Appellant asserts that appellee Public Utilities Commission has violated the Internal Revenue Code and the Fourteenth Amendment to the United States Constitution by prescribing multi-message unit schedules and rates which result in charges of less than 24¢; that such should be considered as part of her flat-rate monthly exchange service without additional charge and without itemization, and that all calls resulting in charges of more than 24¢ should be considered as message toll.

Appellant in her complaint asked for punitive damages from both appellees. No mention is made of any amount of actual damage. Appellant also asked that the Court order her disconnected telephone service to be restored; for refund of alleged illegal charges; for refund of alleged illegal tax on telephone calls; for an order requiring appellees to cease and desist at once the maintenance and collection of telephone charges allegedly in conflict with former provisions of the Internal Revenue Code; for an order to "expand" her exchange service to include all multi-mes-

sage unit calls for which the charge is 24¢ or less and to "expand" the message toll service to include all multi-message unit calls for which the charge is more than 24¢. This would result in there being left, insofar as appellant is concerned, only two schedules which would conform to the Internal Revenue Code's former tax definition of local and long distance telephone calls. It would also result, insofar as this appellee is concerned, in a negating of intrastate telephone rate schedules duly prescribed by it without relation to and not including any federal excise tax.

This appellee's motion to dismiss alleged (1) lack of jurisdiction of the District Court of the subject-matter of the complaint; (2) and the person of the defendant; (3) that the complaint did not state a claim against this appellee upon which relief might be granted; and (4) that the amount in controversy was actually less than the jurisdictional amount which at the time of filing the complaint was $3,000.00. The motion to dismiss was granted upon the third ground.

Appellant's appeal seems to be centered upon the fact that the motion to dismiss was granted by a single judge and not by a three-judge Court.

III. ARGUMENT.

The provisions of 28 USCA, Secs. 2281 and 2284, requiring three-judge courts, do not require three judges to pass upon the initial question of jurisdiction. It appears on its face that the District Court

was without jurisdiction of the subject-matter of the complaint, or the person of this appellee; the complaint does not state a claim upon which relief may be granted; the complaint does not show actual damages in excess of $3,000.00.

The complaint, further, does not present a constitutional question requiring the convening of a three-judge court pursuant to Section 2281, in that it does not challenge the constitutionality of the three rate schedules prescribed by appellee Public Utilities Commission, but alleges that the enforcement of such schedules violates 26 USCA, Secs. 4241, 4252 and 4254 and thus the Fourteenth Amendment to the Constitution of the United States.

A three-judge court is not necessary to pass upon the question of jurisdiction.

Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3, 78 L. ed. 152, is directly in point. There petitioner sought a writ of mandamus to compel a judge of a District Court to call to his assistance two other judges for the purpose of hearing an application for temporary injunction. Petitioner had sought to restrain a state registrar of motor vehicles from enforcing a state statute relative to compulsory automobile insurance. There was neither diversity of citizenship nor a substantial federal question.

The United States Supreme Court found that 28 USCA Sec. 2284 requiring a three-judge court to dismiss a complaint on the merits does not require three judges to pass upon the initial question of jurisdiction.

In *Jacobs v. Tawes,* 151 F. Supp. 770, plaintiff filed a complaint in the District Court to enjoin a state comptroller from collecting sales and use taxes in the amount of $1,914.62. The court found:

> "Although many of the questions raised by the complaint and the motion to dismiss can properly be disposed of only by a three-judge court, 28 USC Sec. 2281, the district judge to whom such a complaint is presented is under a duty to examine the pleading to see if the court has jurisdiction. A three-judge court need not be convened where it appears clearly on the face of the complaint that the court does not have jurisdiction." (Citing cases.)

The court dismissed the complaint on the ground that the amount in controversy was less than $3,000.00.

In *Linehan v. Waterfront Commission of New York Harbor,* 116 F. Supp. 401, plaintiffs sought to restrain the operation and enforcement of a section of the Waterfront Commission Act on the ground of constitutional infirmities under the United States Constitution and the Constitution of the State of New York. A three-judge court was sought. Defendants moved to dismiss on the grounds that the complaint stated no claim upon which relief could be granted, failed to state a cause of action against defendants and that the Court had no equity jurisdiction. The Court stated (p. 403):

> "At the threshold of inquiry is the question of the power of the District Judge to consider and pass upon the various motions for dismissal of the complaint without submitting them to a three-judge statutory court. The cases impress upon

the single judge the duty to determine whether the jurisdictional bases for convening a three-judge statutory court exist."

The District Judge in the court below fulfilled the duty imposed upon him, and his determination that the complaint on its face stated no grounds upon which relief could be granted was obviously correct.

The Court was without jurisdiction of the subject matter of the complaint. Section 1342 of Title 28 of the U.S. Code provides:

"1342. *Rate orders of State agencies.*

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

"(2) The order does not interfere with interstate commerce; and,

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932."

Since appellee State of California, Public Utilities Commission, has exclusive jurisdiction to fix telephone rates within the State of California (28 USCA Sec. 1342, Art. XII, Sec. 23, Constitution of the State of California) it follows that the complaint does not state

a claim against said Commission upon which the relief sought could be granted. Relief is barred by 28 USCA, Sec. 1342, which precludes district courts from interfering with rates chargeable by a public utility such as appellee telephone company, when made by a State rate-making body, which is what appellee Commission is, where claimed jurisdiction is based solely on alleged repugnance of the order to the Federal Constitution, where there is alleged no interference with interstate commerce, where there is no allegation that the order was not made after reasonable notice and hearing, and where there is no allegation that plaintiff has no plain, speedy and efficient remedy in the courts of the State.

Appellant's complaint does not allege that the schedules mentioned in her complaint interfere with interstate commerce or that the decision or order of appellee Commission was made without reasonable notice and public hearing. Neither does appellant allege that she has no plain, speedy and efficient remedy in the courts of the State of California.

Obviously the District Court has no jurisdiction to enjoin appellee Commission from prescribing or enforcing the schedule of rates in question. It has no jurisdiction to "expand" the three schedules into two schedules so as to make them conform to a tax definition of local and long distance service. Appellee Commission has *exclusive* jurisdiction to fix intrastate schedules of telephone rates and charges. (Article XII, Section 23, Constitution of the State of California.)

Only appellee Commission may prescribe regulation of telephone service and tariff schedules. It does not

prescribe excise taxes to be paid on telephone charges nor do the telephone schedules in question include such taxes. The collection of such taxes is the function of the Bureau of Internal Revenue in conformity with the provisions of the Internal Revenue Code, but said Code provides only for collection of taxes and does not provide for regulation of telephone service nor limit the number of tariff schedules, which only appellee Commission may prescribe.

The complaint discloses that the District Court had no jurisdiction of the person of appellee State of California, Public Utilities Commission, since it does not allege that the consent of the State of California to be sued had been sought or obtained. *(Fitts v. McGhee,* 19 S. Ct. 269, 172 U.S. 524, 43 L. ed. 535.)

Appellant in her complaint makes the bare assertion that appellee Commission had given "plaintiff cause for double damages" for prescribing and enforcing the three rate schedules in question "in the sum of $10,000.00" and damages in the sum of $20,000.00 for not restraining appellee telephone company from removing her telephone. This is not enough to confer jurisdiction on the District Court.

In *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 80 L. ed. 1135, we find:

> ". . . The object or right to be protected against unconstitutional interference is the right to be free of that regulation. *The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any

> facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000." (Emphasis supplied.)

The complaint herein throws no light upon the amount of actual damage, if any, appellant has suffered nor is there any statement of facts setting forth "what, if any, curtailment of business and consequent loss the enforcement" of the said schedules, which do not include federal excise tax, "would involve." The complaint "is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation" that the damages for non-payment of telephone charges and subsequent removal of telephone amount to $30,000.00 insofar as appellee Commission is concerned.

Even if appellant's complaint could meet the jurisdictional requirements of Section 1342 of Title 28 of the U. S. Code, still it does not present such a case as must be heard by a three-judge court.

Appellant's complaint alleges that appellee Commission maintained and enforced the three telephone rate schedules hereinabove mentioned, although Sections 4251, 4252 and 4254 provided an excise tax on only two types of telephone charges, which are defined in the Internal Revenue Act of 1954. She alleges that thereby appellee has violated those sections of the Internal Revenue Code and, thus, the Fourteenth Amendment to the Constitution of the United States.

She does not allege that the Commission's rate schedules are unconstitutional without reference to federal legislation. In *Pennsylvania Greyhound Lines v. Board of Public Utility Commissioners,* 107 F. Supp. 521, the court discusses the necessity of convening a three-judge court under such circumstances. On pages 525-526 we find:

> "The substance of objections of the second type is the allegation that the supremacy clause of the Constitution has rendered inoperative a state law which would be valid had not Congress chosen to legislate. Cases of this nature have been considered primarily ones involving interpretation of a federal statute and not constitutional cases within the meaning of § 2281. Consequently, a suit for an injunction against a state official in such circumstances need not be heard before a three judge court. *Ex parte Bransford,* 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249.
>
> "A fairly recent application of this classification of injunction suits is *Case v. Bowles,* 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552. The State of Washington sold some of its school-land timber in a manner prescribed by its constitution and statutes. The United States Price Administrator sued in the federal district court to enjoin the State Commissioner of Public Lands from completing the sale, asserting that its consummation would constitute a violation of the Emergency Price Control Act and applicable regulations. Answering the State's contention that the case should have been tried by a three judge court, the Supreme Court stated:
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> "'* * * But here the complaint did not challenge the constitutionality of the State statute

but alleged merely that its enforcement would violate the Emergency Price Control Act.* * *' 327 U.S. 92, 97, 66 S. Ct. 438, 441.

"[3] It would seem that the reasoning of Case v. Bowles, supra, would govern the instant case. Despite occasional broad language in the complaint, the plaintiff's case rests upon the proposition that the New Jersey statute is inoperative as it applies to it because congressional legislation and valid regulations pursuant thereto govern it, removing it from the area of state control, and not upon the proposition that the New Jersey statute is unconstitutional without regard to federal legislation. Thus, even were § 2281 controlling in a suit for a declaratory judgment, a three judge court would not be necessary here."

IV. CONCLUSION.

Appellee State of California, Public Utilities Commission, respectfully submits that the District Court in sustaining its motion to dismiss committed no error; that it was unnecessary for the Judge in the Court below to convene a three-judge court; that this Honorable Court should affirm the action of the District Court.

Dated: November 21, 1958.

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